

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Landowner Requests to Include Indemnification Provisions in Real Estate Instruments – Formerly Utilized Sites Remedial Action Program (FUSRAP)

1. The purpose of this memorandum is to provide information to Major Subordinate Commands (MSC's) and Districts for their use in negotiations with landowners.
2. The U.S. Department of Energy (DOE) provided indemnification to landowners in certain real estate instruments utilized in connection with FUSRAP. However, when responsibility for program administration and execution was transferred to the Corps, no DOE authorities were transferred which would authorize the Corps to indemnify landowners.
3. Real estate instruments executed by the Corps in connection with FUSRAP shall not contain indemnification or "hold harmless" provisions that are requested by landowners which violate the Anti-Deficiency Act (31 U.S.C. § 1341). *See, e.g., California-Pacific Utilities Co. v. United States*, 194 Ct. Cl. 703 (1971) (involving negotiations with landowners for maneuver permits). Alternatives to unlimited indemnification which may be considered include, but are not limited to, the following:
  - a. obtaining, through negotiations, landowner acceptance of the standard right-of-entry form containing a clause which limits the Government's liability for damages to property to its fair market value;
  - b. acquisition of the necessary interests in real property through condemnation;
  - c. incorporating a requirement in remediation contracts that the landowner be named as an insured in the contractor's liability insurance policy;
  - d. seeking issuance of a compliance order by the U.S. Environmental Protection Agency (EPA) under section 104(e)(5)(A) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as amended, if access is required in connection with a National Priorities List (NPL) site;
  - e. utilization of alternate access routes, staging areas, or locations; and
  - f. deferral of response activities until access agreements can be obtained without objectionable indemnification provisions.

CERE-A (405-10)

SUBJECT: Landowner Requests to Include Indemnification Provisions in Real Estate Instruments – Formerly Utilized Sites Remedial Action Program (FUSRAP)

4. Every reasonable effort should be made to obtain access to real property expeditiously through negotiations consistent with Federal policies set forth in the Uniform Relocation Assistance and Real Property Acquisition Regulations for Federal and Federally Assisted Programs, 49 C.F.R. Part 24. However, condemnation proceedings should not be deferred where they are otherwise required in order to avoid incorporating problematic indemnification provisions in real estate instruments and maintain project schedules. Negotiations with landowners may continue while condemnation assemblies are being processed.

5. If you have any questions regarding the foregoing, you may contact Robert Cribbin at (202) 761-1704.

FOR THE COMMANDER:

/s/

ELIZABETH L. FAGOT  
Acting Director of Real Estate

DISTRIBUTION:

COMMANDER,

GREAT LAKES AND OHIO RIVER DIVISION, ATTN: CELRD-OR-ET-R

MISSISSIPPI VALLEY DIVISION, ATTN: CEMVD-ET-R

NORTH ATLANTIC DIVISION, ATTN: CENAD-ET-R

NORTHWESTERN DIVISION, ATTN: CENWD-MR-ET-A